05-339 SEP 2 6 2005

No. ---

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2004

KEVIN E. BALL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Stogner v. California*, 539 U.S. 607 (2003), warrants reexamination of the applicability of the Ex Post Facto clause to prosecutions under 18 U.S.C. § 922(g).

2. Whether petitioner received ineffective assistance of counsel by virtue of counsel's failure to challenge the admissibility of petitioner's custodial statements secured without the benefit of *Miranda* warnings.

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PETITION FOR A WRIT OF CERTIORARI

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Kevin E. Ball, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 137 Fed. Appx. 580 (4th Cir. 2005). The opinion of the district court (Pet. App.3a-7a) and the recommendation of the magistrate judge (Pet App.8a-29a) are unreported.

JURISDICTION

The Fourth Circuit opinion was issued on June 29, 2005. This Court has jurisdiction under 28 U.S.C. §§ 1254(1), 2241.

RELEVANT CONSTITUTIONAL AND STAUTORY PROVISIONS

Article I, section 9, clause 3 of the United States Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed."

The Fifth Amendment to the United States Constitution provides: "No person * * * shall be compelled in any criminal case to be a witness against himself."

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall * * * have the assistance of counsel for his defence."

Section 922(g)(9) provides that: "It shall be unlawful for any person * * * who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm which has been shipped or transported in interstate or foreign commerce."

STATEMENT OF THE CASE

1. On December 1, 1999 Petitioner was named in a single-count indictment alleging that on August 30, 1999 he had knowingly possessed a firearm in and affecting interstate commerce having previously been convicted of a misdemeanor crime of domestic violence. *See* CA App. 24. More specifically, Petitioner had previously been convicted of a battery for which a guilty plea was entered on November 1,

1995 in the Magistrate Court of Kanawha County, West Virginia, and, as a consequence was alleged to have violated 18 U.S.C. § 922(g)(9).

Petitioner was, at the time of the underlying events, married to Melinda Ball (they have since divorced). Their marriage was a troubled one and in 1995 Petitioner was arrested and charged with domestic battery. The couple reconciled and Petitioner eventually pled guilty to a West Virginia misdemeanor battery offense (as detailed below, there was a substantial factual dispute regarding the precise offense to which Petitioner pled guilty). Petitioner was placed on probation and given a brief (7-day) suspended sentence.

Four years later, in August 1999, the couple had another altercation. When the police responded they arrested an inebriated Petitioner. After questioning him, the police searched the Ball residence and recovered a handgun. As a consequence, Petitioner was charged with violating 18 U.S.C. § 922(g)(9). Following a jury trial he was convicted and sentenced to 24 months imprisonment.

a. On May 16, 1995 Petitioner was arrested following an altercation and charged with the crime of domestic battery in violation of W.Va. Code § 61-2-28(a).[1] The complainant was his wife, Melinda Ball. *See* Criminal Complaint No. 95M-5926 (Mag. Ct. of Kanawha Cty., May 16, 1995). At the time of his arrest Petitioner surrendered the handgun then in his possession to the South Charleston police.

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[1] As in effect in 1995, § 61-2-28(a) provided that:

> If any family or household member unlawfully and intentionally makes physical contact of an insulting or provoking nature with another family or household member or unlawfully and intentionally causes physical harm to another family or household member, he or she is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in jail for not more than twelve months, or fined not more than five hundred dollars, or both fined and confined.

After several continuances, Petitioner (who was represented by a public defender in the proceedings) entered a plea of guilty on November 1, 1995. There is substantial uncertainty in the record as to whether this guilty plea was to the original charge of domestic battery in violation of W.Va. Code § 61-2-28 or to a superceding charge of simple battery, in violation of W.Va. Code § 61-2-9.[2]

Following his guilty plea, Petitioner was sentenced to a 7-day term of imprisonment, which was suspended upon the condition that he pay a fine of $25, court costs of $62 and attend a domestic violence program for 16 weeks. He was also placed on 6 months unsupervised probation. Eventually, his wife, Melinda Ball, paid Petitioner's fine on his behalf. *See* CA App. 31-32 (Hearing Transcript of Feb. 28, 2000). At the completion of his term of probation, in March 1996, the South Charleston Police Department returned Petitioner's handgun to him.

b. Six months later, Congress amended section 922 to prohibit the possession of a firearm by one who had been convicted of a misdemeanor crime of domestic violence. *See* Pub. L. No. 104-208, Div. A, Title I, § 101(f) [Title VI, §§ 657, 658] (Sept. 30, 1996), 110 Stat. 3009-369, -372. There is no evidence in the record that Petitioner was ever made aware of this change in the law. There matters lay for three years, until August 1999, when Petitioner had another altercation with his wife.

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[2] Section 61-2-9 of the West Virginia code, as in effect in 1995, provided that:

> If any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally cause physical harm to another person, he shall be guilty of a misdemeanor, and, upon conviction, shall be confined in jail for not more than twelve months, or fined not more than five hundred dollars, or both such fine and imprisonment.

On that day, the police were called to the Ball residence as a result of a domestic dispute. According to Lieutenant Roy Hutchinson, they formed a "loose barricade" around Petitioner's home. See CA App. 41. Thereafter, Petitioner was induced to participate in what Lt. Hutchinson described as a "surrender ritual." *Id.* at 43-44, 65. Once outside of the house, Petitioner (who was inebriated) was advised that he would either be arrested or be required to submit to treatment at a local hospital. *See id.* at 49, 56, 69. While thus in custody Petitioner was questioned regarding his possession of a handgun, without being provided with his *Miranda* warnings. *See id.* at 70 (no *Miranda* warnings given).

As a consequence of Petitioner's interrogation, the police recovered the handgun from his house. Indeed, "he told [them] where the weapon was. [The police] entered the house, went directly to the location which was in a bedroom, [moved] some articles of clothing * * * and found the weapon." *Id.* at 50. Petitioner was thereafter indicted in a single-count indictment on the charge of having violated the anti-possession provisions of 18 U.S.C. § 922(g)(9). *See id.* at 24.

2. Prior to trial, Petitioner filed a motion to suppress the gun that had been seized from his house as the product of an unconstitutional search in violation of the Fourth Amendment. He argued that because he was intoxicated at the time of his arrest, he lacked the capacity to consent to the search of his house. In his response to a motion *in limine* regarding an ignorance of the law defense, Petitioner eschewed reliance on that defense, instead arguing that he had been affirmatively misled, through the actions of the South Charleston police, to believe that he could lawfully possess a handgun. This, he argued, constituted the law of the case and supported his good faith belief that his possession was lawful, negating any intent he might have.

During pretrial hearings, the district court denied Petitioner's motion to suppress. *See id.* at 85-90. At the outset of Petitioner's trial, the district court denied the remaining motions to dismiss, *see id.* at 93-97 (Trial Tr. Apr. 17-18, 2000)

(denying motion to dismiss based upon West Virginia battery conviction); *id.* 98-103 (denying motions to dismiss on Constitutional grounds). The Court also rejected Petitioner's argument that it was an element of the section 922(g)(9) offense for the government to prove beyond a reasonable doubt that his civil right to possess a firearm had not been restored. *Id.* at 104-07. Finally, the court granted the government's motion *in limine*, prohibiting Petitioner from introducing any evidence as to his own intent in possessing the firearm or as to his reliance upon the actions of the South Charleston police in possessing the handgun. *Id.* at 107-08. Neither during pretrial motions nor during the hearing did Petitioner's counsel challenge the admissibility of the custodial statements he made without the benefit of *Miranda* warnings.

As a consequence, the trial was brief. Petitioner's then-wife, Melinda Ball, testified to Petitioner's prior battery conviction and to the events on the night of August 30, 1999 when Petitioner was arrested. Joel Carter, Petitioner's therapist, testified to his own involvement in the events of August 30th and Petitioner's arrest. Lieutenant Roy Hutchinson of the South Charleston police testified to Petitioner's surrender and to his recovery of Petitioner's handgun from his house. He repeated his testimony regarding the statements Petitioner made outside of the house, while in custody. *See id.* at 113 (recounting that Petitioner gave him permission to retrieve the handgun from his house and "told me [i.e. Lt. Hutchinson] where it was"). Finally, ATF agent Richard Summerfield testified that Petitioner's handgun had been manufactured outside of West Virginia. To a large degree, in light of the court's decision on the motion *in limine*, the evidence was largely uncontested (and uncontestable). Following brief deliberations, the jury returned a guilty verdict.

3. Following conviction, Petitioner was, on August 9, 2000, sentenced to a term of 24 months imprisonment. He appealed his conviction to the Fourth Circuit. On appeal Petitioner contended that his conviction violated the Ex Post Facto clause, arguing that his battery conviction had occurred